Supreme Court, U.S.
FILED

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Supreme Court of the United States

JAMES CONSTANT,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through the Department of
Transportation, Real Party in Interest,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of California,
4th Appellate District

PETITION FOR WRIT OF CERTIORARI AND MOTION TO VOID JUDGMENT

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April 15, 2011

QUESTIONS PRESENTED

1. On his petition to the California Supreme Court: is the petitioner entitled to a written and published opinion under his 1st Amendment right to petition, 5th Amendment right for due process and 14th Amendment right for equal treatment?

2. On his motion to void the trial court's judgment for lack, of fundamental jurisdiction, did the California Appeal Court have discretion to avoid and not hear and decide the motion without a written and published opinion?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Petitioner James Constant, in propria persona, respectfully prays that a writ of certiorari issue to review the California Supreme Court's decision denying petitioner's Petition for Review of Appeal Court's decision.

OPINIONS BELOW

The California Supreme Court's decision denying petitioner's Petition for Review filed 1/26/11, and the California Appeal Court's decision filed 11/16/10 appear as Appendices 3 and 1 respectively to this Petition.

JURISDICTION

The California Supreme Court's decision in this matter was final on 1/26/11. This Court's jurisdiction is invoked under Title 28 USC 1257.

STATUTORY PROVISIONS INVOLVED

First (petition to redress grievances), Fifth (due process, just compensation) and Fourteenth (equal treatment) Amendments to the United States Constitution.

STATEMENT OF THE CASE

This is an eminent domain action in which plaintiff The People of the State of California, acting by and through the California Department of Transportation ("State"), in 2002 condemned certain real property owned by defendant petitioner. In 2007, a jury trial was held and the trial court entered judgment against the petitioner. Petitioner filed a first appeal in consolidated cases E044802 (constitutional claims) and E045320 (Motion to Dismiss Case under Code of Civil Procedure section 1268.020(B)(2)). The California Appeal Court affirmed the trial court's judgment and ordered non publication. Petitions to Review were made to the California Supreme Court and this Court and these were denied without opinion (Case No. 09-381). The issues of "no opinion" and "non publication" raised in the present case also characterize the first appeal.

Petitioner filed a second appeal in consolidated Cases E049886 (costs) and E049988 (Motion to Set Aside Judgment under Code of Civil Procedure section 663). At the hearing the petitioner moved the appeal court to void the trial court's judgment for lack of fundamental jurisdiction. *See* Appendix 2 (Motion to Void Judgment). The trial court had precluded petitioner from testifying and offering evidence of value of his property at trial raising Fifth Amendment due process and just compensation issues. The appeal court remained silent on petitioner's Motion to Void Judgment for lack of fundamental jurisdiction, which was not heard and decided, denied petitioner's

appeal of costs, denied the section 663 motion to set aside judgment and ordered non publication. *See* Appendix 1 (Appeal Court's Decision).[1] On 1/26/11, the California Supreme Court denied petitioner's Petition For Review of Appeal Court's Decision without opinion. *See* Appendix 3. A petition for rehearing was returned to petitioner unfiled. *See* Appendix 4.

Motion to Void Judgment For Lack of Fundamental Jurisdiction

The Court should postpone reading and deciding the present petition before it reads and decides petitioner's Motion to Void Judgment for lack of fundamental jurisdiction set forth in Appendix 2, the granting of which would dispose the entire case or affect the final judgment to be entered.

The Court should take judicial notice that the Motion to Void Judgment for lack of fundamental jurisdiction presented to the court of appeals, Appendix 2, is not the section 663 Motion to Set Aside the Judgment decided by the trial court and affirmed by the appeal court in its opinion, Appendix 1. There is no reference in the appeal court's opinion Appendix 1 that refers to the Motion to Void Judgment for lack of jurisdiction, Appendix 2, or to the trial court's Minute Orders precluding appellant from testifying and

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[1] The cost part of the appeal court's opinion is not part of this petition.

offering evidence of value of his property at trial, Appendix 16.

Petitioner moves the Court to void the judgment for lack of fundamental jurisdiction. Petitioner's suggestion for lack of fundamental jurisdiction is made pursuant to FRCP 12(h)(3) and his Motion to Void Judgment for lack of fundamental jurisdiction, Appendix 2, is made pursuant to Rule 21.1. As this Court has held "Rule 12(h)(3) instructs: 'if it appears by *suggestion* of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). *Italics added.*

Petition Legal Standards

A party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and must have raised the issue at the appropriate time below. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); see also *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988); *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Before this Court now are two interrelated questions: whether the state court "no opinion" and "non publication" judgments are based upon a nonfederal ground and whether the nonfederal ground is adequate to support the state court judgments.

With regard to the first question, it is essential for purposes of review by this Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it. *Southwestern Bell Tel. Co. v. Oklahoma*, 303 U.S. 206 (1938); *Raley v. Ohio*, 360 U.S. 423, 434-437 (1959). When there is uncertainty about what the state court did, the usual practice was to remand for clarification. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940); *California v. Krivda*, 409 U.S. 33 (1972). See *California Dept. of Motor Vehicles v. Rios*, 410 U.S. 425 (1973). Now, however, in a controversial decision, this Court has adopted a presumption that when a state court decision fairly appears to rest on federal law or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion the Court will accept as the most reasonable explanation that the state court decided the case as it did because it believed that federal law required it to do so. If the state court wishes to avoid the presumption it must make clear by a plain statement in its judgment or opinion that discussed federal law did not compel the result, that state law was dispositive. *Michigan v. Long*, 463 U.S. 1032 (1983). See *Harris v. Reed*, 489 U.S. 255, 261 n. 7 (1989) (collecting cases); *Coleman v. Thompson*, 501 U.S. 722 (1991) (applying the rule in a habeas case).

With regard to the second question, in order to preclude review by this Court, the nonfederal ground must be broad enough, without reference to the federal question, to sustain the state court judgment, *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590, 636 (1874). A new state rule cannot be invented for the occasion in order to defeat the federal claim. E.g., *Ford v. Georgia*, 498 U.S. 411, 420-425 (1991). The nonfederal ground must be independent of the federal question, *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 290 (1958), and the nonfederal ground must be a tenable one, *Enterprise Irrigation District v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164 (1917); *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Staub v. Baxley*, 355 U.S. 313, 319-320 (1958). Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude review by this Court as an adequate independent state ground, *Nickel v. Cole*, 256 U.S. 222, 225 (1921); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960), so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights. *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 455-458 (1958); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964).

The first question may be raised by several factual situations. Here, the federal grounds have been raised but the state court "no opinion" and "non publication" judgments are without written and published opinions stating the grounds relied on. In any event, it is essential for purposes of review by this Court that it appear from the record that a federal question was presented, that the disposition of that question was necessary to the determination of the case, that the federal question was actually decided or that the judgment could not have been rendered without deciding it. *Southwestern Bell*, *Raley*, *supra*.

With regard to the second question, in order to preclude review by this Court, the nonfederal grounds must be broad enough, without reference to the federal question, to sustain the state court judgment, *Murdock*, *supra*, the nonfederal ground must be independent of the federal question, *Enterprise Irrigation*, *Ivanhoe Irrigation*, *supra*, and the nonfederal ground must be a tenable one. *Enterprise Irrigation*, *Ward*, *Staub*, *supra*. Rejection of a litigant's federal claim by the state court on state procedural grounds, such as failure to tender the issue at the appropriate time, will ordinarily preclude review by this Court as an adequate independent state ground, *Nickel*, *Wolfe*, *supra* so long as the local procedure does not discriminate against the raising of federal claims and has not been used to stifle a federal claim or to evade vindication of federal rights. *Davis*, *NAACP*, *Barr*, *supra*.

REASONS FOR GRANTING THE WRIT

This 9-year eminent domain case challenges the state court's fundamental jurisdiction based on federal grounds under the Fifth Amendment rights of due process and just compensation. The federal constitutional issues on appeal were timely raised in the courts below to have enabled to have them considered. *See* Appendix 2 (Motion to Void Judgment).

The California Supreme Court's denial of the petition for review without opinion is based on nonfederal grounds "without opinion". It has been the accepted California practice for both the California Supreme Court and appeal courts to deny appeals without written opinions. Such practice is inadequate to support state court judgments on claims and on objections made on federal grounds.

Likewise, the state appeal court's unpublished opinion is based on nonfederal grounds "non publication". It has been the accepted California practice for both the California Supreme Court and state appeal courts to order non publication. Such practice is inadequate to support state court judgments on claims and on objections made on federal grounds.

Such practices of denying petitions "without opinion" and "non publication" are forced by economics, with limited resources the state courts are unable to handle the avalanche volume of cases. About 91-99% of cases are disposed of in this manner. The California Supreme Court issued 116 written opinions in fiscal year 2008-2009. Filings totaled 9,274,

and dispositions 99% totaled 9,513. Statewide, 91% percent of state Court of Appeal majority opinions were unpublished. *See* at http://yubanet.com/california/Trial-Court-Caseload-Increases-to-Over-10-Million-Filings.php. As result, the state courts are unable to perform their constitutional duties at the expense of citizens, like petitioner, who are left to hang in the wind of local "no opinion" and "non publication" procedure which discriminates against the raising and hearing of federal claims and is used to stifle federal claims and to evade vindication of federal rights.

Finally, Americans believe that their rights do not originate with government but are to be "secured" by government: "The Right of the people to petition the government for redress of grievances", "nor be deprived of liberty or property without due process of law; nor shall property be taken for public use, without just compensation" and "equal treatment". It is easy to see how the California courts have failed to support these phrases in the First, Fifth and Fourteenth Amendments, and how California judges have failed their oaths.

The right to petition, if it exists at all, means that people can stand up to and demand answers from their politicians, bureaucrats, and judges. By placing the First Amendment Right to Petition and Fifth Amendment Due Process and Just Compensation and the Fourteenth Amendment Right to Equal Treatment issues squarely before the Judiciary, this lawsuit clearly and unambiguously presents the most

fundamental legal question: Is Government a servant government, limited by a written Constitution, or is it free to ignore the Constitution and do whatever it wants to do?

The California state "without opinion" and "no publication" practices violate the First Amendment right to petition because they refuse to hear and answer petitioner' s federal claims and publish their opinions. What is the meaning of the right to petition when the chance of having a written opinion is 1% and having a fraction of that as an unpublished opinion? Judges have no motive to write written and published opinions and the State of California as plaintiff need not file briefs in opposition to defendant's petitions knowing that the odds are in their favor. The state courts might just as well hang a sign on their front doors advising citizens filing cases and dreaming of justice that the Constitution no longer applies. The courts would no longer pretend that the rule of law applies, the number of filings would vanish and litigants and courts would conserve their meager resources.

CONCLUSION

The California Supreme Court's denial of the petitions for review and rehearing are without written opinion stating the grounds relied on and the state appeal court's written opinion is without hearing petitioner's Motion to Vacate The Judgment for

lack of fundamental jurisdiction and its opinion was ordered not for publication. The lower court judgments, therefore, are based on nonfederal "without opinion" and "no publication" grounds inadequate to support the state court judgments which deprive petitioner of his First, Fifth and Fourteenth Amendment rights.

Honorable Justices of this Supreme Court: tear down the "no opinion" and "no publish" walls of judicial tyranny that deprive petitioners of their constitutional and civil rights.

The judgment[2] should be declared void for lack of fundamental jurisdiction and/or the petition for Writ of Certiorari to the California Supreme Court should be granted.

Originally submitted 15 March, 2011
Resubmitted 15 April, 2011

Respectfully submitted,

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[2] A copy of the judgment is found in related petition Case 09-381 at pages 51-55.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent, v. JAMES CONSTANT, Defendant and Appellant.	E049886, E049988 (Super.Ct.No. SCVSS096961) **OPINION** (Filed Nov. 16, 2010)

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed.

James Constant, in pro. per., for Defendant and Appellant.

Ronald W. Beals, Linda Cohen Harrel, and Eric J. Fleetwood for Plaintiff and Respondent.

This is another in a long line of appeals brought by appellant James Constant in connection with the taking of his one and one-half acre parcel in Fontana (the property) by respondent California Department of Transportation (the State) in order to extend the I-210 freeway. Constant filed several petitions for writ of mandate contesting that the State could

rightfully take his property, which we denied, thereby affirming the taking of the property. Constant then appealed the awarded compensation in three consolidated cases. In our opinion on those appeals (The People ex rel. Department of Transportation v. James Constant (May 13, 2009, E044802, E045320 & E046012 [nonpub. opn.] (the prior opinion)), we affirmed the trial court's grant of the State's judgment notwithstanding the verdict (JNOV) reducing the jury's award of just compensation to Constant for the property. We remanded to the trial court to determine the costs to which Constant was entitled under Code of Civil Procedure sections 1268.710 and 1268.720.[1]

Upon remand, the trial court awarded Constant his costs of suit in the amount of $1,736.82 and appellate costs in the amount of $11,102.14. It granted the State's motion to tax costs in part, denying Constant payment of his attorney fees and costs for preparing his trial exhibits. Constant also filed a motion to set aside the judgment under section 663, which was denied by the trial court.

In case No. E049886, Constant appeals the grant of the State's motion to tax costs. In case No. E049988, Constant appeals the denial of his request to set aside the judgment.

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

We affirm both the trial court's grant of the State's motion to tax costs and its denial of defendant's motion to set aside the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

The San Bernardino County Board of Supervisors adopted a resolution of necessity to condemn the property owned equally by Constant and his brother Robert Constant (Robert) since Constant and Robert refused to sell the property to the State. The property was to be used to create a freeway frontage road in accordance with the extension of the I-210 freeway. On May 21, 2002, the State deposited $187,000 pursuant to section 1255.010, subdivision (a).[3]

The trial court found that the State had a right to take the property. Constant brought several petitions

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[2] The prior opinion exhaustively documented the history of this case, and we incorporate it into this opinion by reference. We only briefly review the background and continue with the facts occurring subsequent to the opinion.

[3] Constant has stated in his opening briefs that the "record of prior consolidated case Nos. E044802, E045320 and E046012 is adopted by reference as if set forth herein in full." However, those cases have not been consolidated with the instant cases. Accordingly, we take judicial notice of the records and the opinion filed in those cases. The State's request for judicial notice of our opinion is deemed moot. Constant misinterprets California Rules of Court rule 8.1115(a) in arguing that the unpublished opinion cannot be relied upon in this case; it can be relied upon under subdivision (b)(1).

for writ of mandate contesting the taking, which were denied by this court.

After a jury trial, the jury entered its verdict that the fair market value of the property was $390,756.85. The trial court granted the State's JNOV, finding the jury verdict did not match the valuation testimony at trial. The judgment was reduced to $194,189. Constant was awarded $97,094.50 (his half-interest share of the property) and the filing fee cost of $220. The judgment in condemnation was entered on October 26, 2007. The trial court denied all other costs to Constant.

In the prior opinion, we affirmed the judgment of the trial court. However, we remanded for the limited purpose of determining the proper costs to be awarded Constant under sections 1268.710 and 1268.720.

Constant thereafter filed a motion for costs and a memorandum of costs, and the State filed a motion to tax costs, as will be discussed in more detail, *post*. On November 9, 2009, a judgment was filed awarding Constant $97,064.50 plus interest, $1,736.82 in costs of suit, and $11,102.14 in appellate costs. Constant filed a notice of appeal from the grant of the State's motion to tax costs.

In addition, on October 7, 2009, defendant filed a motion to set aside the judgment pursuant to section 663. He raised nine claims of error that he claimed mandated reversing the judgment. The State filed opposition. The substance of the motion, opposition,

and hearing on the matter will be explicated, *post*. The trial court denied the motion to set aside the judgment, finding that the issues had already been adjudicated by the state and federal appellate courts. Constant filed a notice of appeal from the denial of the motion to set aside the judgment.

II. STATE'S MOTION TO TAX COSTS

In case No. E049886, Constant contends that the trial court erred by granting (in part) the State's motion to tax costs. [This part of the opinion is not reproduced as Case No. E049886 is not part of this petition.]

* * *

III. MOTION TO SET ASIDE THE JUDGMENT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 663

In case No. E049988, Constant contends that the trial court erred by denying his motion to set aside the judgment filed upon remand from this court.

A. *Additional Factual Background*

Defendant filed his motion to set aside the judgment under section 663 on October 7, 2009. He claimed the judgment was improper for nine separate reasons: (1) the JNOV amount was not properly computed; (2) the judgment failed to properly apportion the compensation; (3) the judgment did not

"reflect the 100% damage and no benefits"; (4) "a several judgment [was] proper"; (5) the judgment made no adjustment for rapid land increase between the date of deposit and the date of trial; (6) the judgment makes no adjustment for delay in payment between the date of deposit in 2002 and the date of trial in 2007; (7) the JNOV was inappropriate; (8) the judgment was void because it was based solely on the State's expert and excluded evidence and testimony of value by Constant; and (9) the judgment was void because the State did not make a proper pretrial deposit.

The State argued in its opposition that a section 663 motion did not authorize setting aside the judgment on any of the grounds raised by Constant. The State filed an amended opposition stating the issues had already been resolved by the appellate courts, and section 663 could not be used to attack the compensation.

A hearing was conducted on December 15, 2009. Constant argued at the hearing that the valuation testimony presented at trial was not sufficient to support the compensation and that he should have been allowed to testify. The State responded that all of the errors had already been reviewed by the appellate courts, and remand was limited to determining costs.

The trial court denied the section 663 motion, finding, "These issues have been raised with the Appellate Court. The Appellate Court rendered a

decision and the defendant, as claimed by the State, has exhausted his remedies in the case by petitioning the California Supreme Court and the United States Supreme Court. Neither of which have taken up the appeal, so the Court will deny the motion."

B. *Analysis*

Initially, Constant contends that the State failed to satisfy the requirement of California Rules of Court, rule 8.1115(c) by not attaching a copy of the prior opinion to its opposition to Constant's motion to set aside the judgment. He further contends that the trial court likewise failed to comply with that rule by not providing him with a copy of the prior opinion when it denied the section 663 motion. In this case, however, both the parties and the trial court already had copies of the prior opinion; it would have served no purpose to provide additional copies.

Constant's remaining claims include that the trial court erred by refusing to allow him to testify as to the value of the property; the State failed to make an independent predeprivation appraisal and failed to make a statutory predeprivation offer to pay for an appraisal by Constant, and the trial court failed to vacate the order of possession; the judgment does not reflect the "9 uncontroverted issues presented in [the] § 663 motion"; the State filed a frivolous opposition to his section 663 motion; the judgment should have been reversed, as he was denied due process by being foreclosed from testifying; "the trial court perpetrated

fraud in each of the 9 issues presented in the section 663 motion" (capitalization omitted); and the trial court exceeded its jurisdiction by denying his section 663 motion. The only issue that is before this court is whether the trial court abused its discretion by denying Constant's section 663 motion.

Section 663 reads: "A judgment or decree, when based upon a decision by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment: [¶] 1. Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts; and in such case when the judgment is set aside, the statement of decision shall be amended and corrected. [¶] 2. A judgment or decree not consistent with or not supported by the special verdict."

Hence, "'"[a] motion to vacate under section 663 is a remedy to be used when a trial court draws *incorrect conclusions of law* or renders an erroneous judgment on the basis of *uncontroverted evidence*."' [Citations.]" (*Payne v. Rader* (2008) 167 Cal.App.4th 1569, 1574.)[4] The decision by the trial court to deny

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[4] We note that there is a question if the section 663 motion was timely made, in that it attacks the original judgment. However, since the State does not raise the issue and we affirm the order, we need not address the issue.

a motion to set aside the judgment is reviewed under the deferential abuse of discretion standard. (*National Secretarial Service, Inc. v. Froehlich* (1989) 210 Cal.App.3d 510, 524.)

In his section 663 motion, Constant raises essentially the same claims he raised in the prior appeals based on the almost identical facts, and the law of the case would have precluded the trial court, and precludes us on appeal, from reaching contrary legal results. (*People v. Cooper* (2007) 149 Cal.App.4th 500, 524 [law of the case requires same conclusion where matter retried on same evidence].)

Further, even if the issues could be addressed by the trial court, Constant provided virtually no proper argument or record in the trial court (or in this court for that matter) to support that the judgment or compensation was based on the trial court's incorrect conclusions of law or that it rendered an erroneous judgment on the basis of uncontroverted evidence. (*National Secretarial Service, Inc. v. Froehlich, supra,* 210 Cal.App.3d at p. 525 ["[t]his shotgun attack on the judgment was not supported by any showing made by the defendants beyond the same empty technical arguments previously discussed"].) As we previously found, there are no irregularities in the judgment or the compensation award. The motion simply was not supported by any coherent argument or facts to support it in the lower court. Hence, we conclude the trial court did not abuse its discretion by denying Constant's motion to set aside the judgment.

IV. DISPOSITION

We affirm the judgment. Under section 1268.720, we award Constant his costs on appeal despite his failure to prevail on appeal.[5]

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RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.

[5] We note that Constant's appeal of his section 663 motion to set aside the judgment is bordering on frivolous, but departures from the general rule in eminent domain actions to award costs to the defendant landowner should be rare. (*Eastern Municipal Water Dist. v. Superior Court* (2007) 157 Cal.App.4th 1245, 1256 [Fourth Dist. Div. 2].)

Court of Appeal, 4th District, Division Two
Stephen M. Kelley, Clerk/Administrator
3389 12th St., Riverside, CA 92501

3 November, 2010

People v. State of California
Plaintiff and Respondent

v.

James Constant
Defendant and Appellant

E049886, E049988

(Sup.Ct.No. SCV96961)

APPELLANT'S WRITTEN RESPONSE
TO THE TENTATIVE OPINION
IN LIEU OF ORAL HEARING ON
3 NOVEMBER, 2010

MOTION TO VOID JUDGMENT

Pursuant to the Court's Order filed 30 July, 2010, appellant submits the attached written response in lieu of the oral hearing. A conformed copy is requested.

Respectfully submitted

Dated: 3 November, 2010 By:

FILED
NOV 3 2010
COURT OF APPEAL
FOURTH DISTRICT

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THE JUDGMENT IS VOID

The Tentative Opinion ("TO") at p 15 wrongly assumes that fundamental jurisdiction[1] exists, that discretionary powers are appropriate, and wrongly applies estoppel when appeal is made from a void judgment under the 5th Amendment due process clause.

Here, the trial court had no fundamental jurisdiction because it deprived appellant of the opportunity to participate and offer his valuation opinions of his property at trial and the judgment, therefore, is void for extrinsic fraud. *U.S. v. James Daniel Good Real Property* 510 US 43 (1993) (Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice *and a meaningful opportunity to be heard* before seizing real property subject to civil forfeiture..) *Italics added.*

As discussed in Op. Br. 9, appellant's testimony and evidence as a property owner were precluded by the trial court which held that appellant "may offer no valuation opinions as those would require expert presentation". Case E049988 App.4,8, RA 60,65; See same facts in Appendix in Case E049886 at pages 8,12, RA 59,64.

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[1] A trial court lacks jurisdiction in the fundamental sense "where the type of proceeding is beyond the jurisdiction defined for that particular court by statute *or constitutional provision.*" *Italics added. Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288.

The TO at p 15 wrongly reviews the judgment under the deferential abuse of discretion standard. However, when the judgment is void, the trial and appeal courts have no discretion and must decide whether the judgment is void or it is not. In *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180 the Supreme Court held, "where, as here, there is an appeal from a void judgment, the reviewing court's jurisdiction is limited to reversing the trial court's void acts." [Citation.]" (Id. at p. 200).[2] For convenience, copies of the trial court's void orders (p 8 hearing 8/15/07 1st day of trial and p 12 hearing 8/16/07 2nd day of trial) are attached hereto.

Finally, a void judgment cannot be estopped. Estoppel, waiver or agreement will not endow a court with jurisdiction. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6,17-18 (1851).

THE JUDGMENT IS VOIDABLE

But even assuming arguendo that fundamental jurisdiction exists (which it does not because appellant was deprived of due process), section § 663 allows the trial court to vacate a judgment not supported by the facts. Here, as shown in attachments, by exceeding its authority under Evidence Code

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[2] "Where there is no jurisdiction, there can be no discretion, for discretion is incident to jurisdiction." *Piper v. Pearson, 2 Gray 120,* cited in *Bradley v. Fisher,* 13 Wall. 335, 20 L.Ed. 646 (1872)

§ 813(a), and exceeding its authority in *Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal. App. 3d 865,877 ("the only type of evidence which can be used to establish value is the opinion of qualified experts *and property owners". Italics added*), appellant was precluded from participating in his case and offer his valuation opinions at trial.

Finally, the TO wrongly applies estoppel because the trial court's decision that "the issues have already been adjudicated by the appellate courts (both State and Federal)", App 75, exceeds its jurisdiction since the appellate court's denials were made without opinion and cannot therefore be deemed conclusive on merits. The TO is silent on each of 9 issues presented in the § 663 motion, O.Br. 13, including the jurisdictional issues of fundamental jurisdiction, due process, extrinsic fraud and excess of jurisdiction, detailed in O.Br. 15-18.

Appellant is entitled to an appellate court's determination on each of the 9 issues presented in his § 663 motion including issues of lack of fundamental jurisdiction, due process, extrinsic fraud, and excess of jurisdiction contentions "in writing with reasons stated" (Cal. Const., art. VI, § 14). *People v Medina*, 6 Cal.3d 484 (1972).

CONCLUSION

1. The judgment in condemnation, App. 70-73, should be vacated and Case Nos E049886, E049988

and all cross referenced cases appearing on the Court's Website should be dismissed;

2. The Court should Order the State to pay appellant's costs in total amount of $19,232.84 through 12/31/09 (Case E049886 p. 10) plus costs and attorney's fees since 12/31/09; and

3. The Court should order the State of California to pay appellant just compensation and damages for the temporary taking of the subject property between 11/20/02, the date of commencement of the action, and the date the property reverts to its prior condition; or, in the alternative, to save the parties and the Court's time and resources, the Court should order the remedy proposed by EXHIBIT 3, App. 23-24.

Dated: 11/1/10 Respectfully submitted

By: _____

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IN THE SUPERIOR COURT OF
SAN BERNARDINO COUNTY

SCVSS96961 Pre Trial Minute Order
Hearing 8/15/07 1st day of trial

THE COURT REVISITS THE ISSUE OF EXPERT VALUATION TESTIMONY BY JAMES CONSTANT (PLAINTIFF'S mil #5).... DEFENDANT MAY ONLY TESTIFY AS TO MATTERS OF FACT, LAY ISSUES SUCH AS SITUATION, CONDITION AND OWNERSHIP OF THE PROPERTY. HE MAY OFFER NO VALUATION OPINIONS AS THOSE WOULD REQUIRE EXPERT PRESENTATION....

SCVSS96961 Pre Trial Minute Order Hearing 8/16/07
2nd day of trial

THE COURT RETURNS TO THE SUBMITTED MIL #5 OF THE PEOPLE TO EXCLUDE EXPERT OPINION TESTIMONY BY DEFENDANT JAMES CONSTANT AS TO THE ISSUE OF VALUATION. PLAINTIFF'S MOTION IN LIMINE TO PREC VALUATION TESTIMONY BY JAMES CONSTANT GRANTED.

Court of Appeal, Fourth Appellate District,
Division Two – Nos. E049886/E049988

S188598

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE EX REL. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent,

v.

JAMES CONSTANT, Defendant and Appellant.

AND CONSOLIDATED CASE.

(Filed Jan. 26, 2011)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

[SEAL]

CARMEN A. KISSINGER
ASSISTANT CLERK
ADMINISTRATOR

JORGE NAVARRETE
ASSISTANT CLERK
ADMINISTRATOR

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Supreme Court of California

FREDERICK K. OHLRICH
COURT ADMINISTRATOR AND
CLERK OF THE SUPREME COURT

February 3, 2011

James Constant
1603 Danbury Drive
Claremont, CA 91711

Re: **S188598 – Petition for Rehearing**

Dear Mr. Constant:

No action may be taken on your "petition for rehearing," received February 3, 2011. The order of this court filed January 26, 2011, denying the above-referenced petition, was final forthwith and may not be reconsidered or reinstated. Please rest assured, however, that the entire court considered the petition for review, and the contentions made therein, and the denial expresses the court's decision in this matter.

Very truly yours,

FREDERICK K. OHLRICH
Court Administrator and
Clerk of the Supreme Court

/s/ Robert R. Toy
By: Robert R. Toy, Deputy Clerk

Enclosure